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No. 01-618

IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,

Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity
as Attorney General,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF SENATOR ORRIN G. HATCH AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether the 20-year extension of the terms of all copyrights, set forth in the Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998), violates the Copyright Clause of the Constitution.

2. Whether the CTEA's 20-year extension of the terms of all copyrights violates the First Amendment.

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STATEMENT OF INTEREST[1]

Amicus Curiae Orrin G. Hatch is a United States Senator from the State of Utah who was the principal sponsor of the Senate version of the Copyright Term Extension Act (CTEA), Pub. L. No. 105-298, 112 Stat. 2827 (1998), and Chairman of the Senate Judiciary Committee at the time the Act was considered and adopted by the Senate. In addition, he was the Chairman of the Senate-House of Representatives Conference Committee on the CTEA, which crafted the final version of the statute. As former Chairman and now ranking Republican on the Senate Judiciary Committee, Senator Hatch has been a leader in the field of intellectual property law in the United States. He is also a respected legal scholar who has written and spoken extensively in the field of intellectual property law. Senator Hatch's interest in this important case stems from his commitment to the CTEA as well as his experience and expertise in copyright law. As an author of the CTEA and a legal scholar in this field, Senator Hatch is uniquely positioned to identify the evidentiary grounds that led to the enactment of the CTEA and to locate those grounds within the power afforded to Congress in the Copyright Clause of the Constitution.

SUMMARY OF ARGUMENT

At issue in this case is whether the Copyright Term Extension Act is a proper exercise of Congress's authority under the Copyright Clause to "promote the progress of science" by protecting copyrights for "limited times." Congress answered that question in the affirmative roughly

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* or his counsel has made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a), *amicus* further states that a letter of consent to file this brief from Respondent has been filed with the Clerk of the Court; Petitioners have filed with the Clerk of the Court a blanket consent letter for all *amici*.

six years ago, based on an extensive evidentiary record and detailed findings. Petitioners would have this Court revisit those findings, exercise plenary review of Congress's determination that the CTEA strikes the proper balance between the various competing interests at issue, and ultimately substitute its own judgment for that of Congress.

For the reasons noted in section I below, this Court should reject Petitioners' request that the Court second-guess Congress, and instead decide this case on the basis of whether Congress acted rationally in concluding that the CTEA is an appropriate response to new challenges in the area of intellectual property. The CTEA clearly survives constitutional scrutiny under this properly deferential standard. As explained in section II, the constitutional goal of "promot[ing] the progress of science" extends not only to establishing incentives for the creation of artistic works, but also to encouraging their dissemination and preservation. Because Congress had before it extensive evidence that copyright extension would have all of these salutary effects, the CTEA must be upheld as a valid exercise of Congress's copyright power. Finally, as set forth in section III, the extension enacted in the CTEA satisfies the "limited times" provision of the Copyright Clause. Petitioners' contrary argument fails as an attempt to replace the ratified language of the Constitution with the more stringent standards that were proposed at the Constitutional Convention but ultimately rejected—standards that would call into question the constitutionality of copyright renewals and extensions dating back to and preceding the founding era.

ARGUMENT

I. THE COURT SHOULD UPHOLD THE CTEA SO LONG AS IT IS RATIONALLY DESIGNED TO "PROMOTE THE PROGRESS OF SCIENCE."

The standard of review implicit in Petitioners' constitutional challenge must be rejected in favor of a more deferential one. As the court of appeals recognized, "the text of the Constitution makes plain" that "it is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors or to inventors in order to give the appropriate public access to their work product." *Eldred* v. *Reno*, 239 F.3d 372, 380 (D.C. Cir. 2001) (quoting *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). See also *Pennock* v. *Dialogue*, 27 U.S. 1, 16-17 (1829) (Copyright Clause contemplates that "limited times" "period shall be subject to the discretion of Congress").

Because the Constitution allocates the copyright power to Congress—and in so doing calls on Congress to undertake a "task [that] involves a difficult balance" between competing interests, *id.*—this Court has properly accorded a degree of deference to the balance that Congress ultimately strikes. The Court summed up the standard in *Stewart* v. *Abend*, 495 U.S. 207, 230 (1990): "Th[e] evolution of the duration of copyright protection tellingly illustrates the difficulties Congress faces .... It is not our role to alter the delicate balance Congress has labored to achieve."

In recognition of that principle, this Court has consistently accorded substantial deference to Congress under its exercise of the copyright power. In *Graham* v. *John Deere Co.*, for example, the Court explained that "[w]ithin the limits of the constitutional grant, the Congress may, of course, implement the stated purpose of the Framers by selecting the policy which *in its judgment* best effectuates the constitutional aim." 383 U.S. 1, 6 (1966) (emphasis added). Such deference is

particularly appropriate in the field of intellectual property, where Congress continually must respond to changing technologies and markets. See, *e.g.*, *Sony Corp. of Am.* v. *Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984) (noting that the effect of technological innovations on the market for copyrighted materials supports the Court's "consistent deference to Congress").

Deferential review of the CTEA comports not only with the Court's cases under the Copyright Clause, but also with the general rule that "[d]ue respect for the decisions of a coordinate branch of Government demands that [the Court] invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *United States* v. *Morrison*, 529 U.S. 598, 607 (2000). It also corresponds to the standard of review applied to legislation enacted pursuant to other Article I powers.

By highlighting the similarities between the Copyright Clause and the Necessary and Proper Clause, for example, Petitioners apparently acknowledge that the CTEA should be reviewed under the same deferential standard. See Pet. Br. 17 ("[T]he *rights* part of the Copyright Clause stands to the *progress* part as the Necessary and Proper Clause stands to the other enumerated powers."). Under the Necessary and Proper Clause, it is well established that so long as the object of federal legislation lies within Congress's delegated powers, the Court defers substantially to Congress's choice of means for achieving that object. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

The Spending Clause provides another helpful analogy. Just as the Copyright Clause authorizes Congress to secure copyrights "[t]o promote the Progress of Science" by granting copyrights of limited duration, U.S. Const. art. I, § 8, cl. 8, the Spending Clause empowers Congress to tax and spend to "provide for the ... general Welfare." *Id.* § 8, cl. 1. In the context of the Spending Clause, the Court has explained that "[i]n considering whether a particular expenditure is intended

to serve general public purposes, courts should defer substantially to the judgment of Congress." *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987); see also *Helvering* v. *Davis*, 301 U.S. 619, 645 (1937) ("[T]he concept of welfare or [its] opposite is shaped by Congress ...."). Thus, while it is true that all legislation enacted pursuant to the Spending Clause is subject to the narrow limitations imposed by the "general welfare" requirement, Congress has broad latitude to define the general welfare, and its judgment in this area is upheld so long as it is rational. *Lyng* v. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am.*, 485 U.S. 360, 373 (1988) ("[T]he discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts.") (citing *Bowen* v. *Owens*, 476 U.S. 340, 345 (1986)).

The same analysis applies under the Copyright Clause. All copyright legislation must "promote the Progress of Science" by "securing [exclusive publication rights] for limited times," but the courts defer to Congress's informed, rational judgment regarding whether a particular statute satisfies that standard. See *Sony*, 464 U.S. at 429; *Pennock*, 27 U.S. at 16-17. There can be no serious dispute that the CTEA is constitutional under that standard.

As explained in greater detail below, Congress conducted hearings and made extensive findings as to the CTEA's consistency with the commands of the Copyright Clause. See *infra* at 18-26. The statute's legislative history makes clear that Congress was well aware that "copyright protection should be for a limited time only" and that "[p]erpetual protection does not benefit society." 144 Cong. Rec. H1458 (daily ed. Mar. 25, 1998) (comments by Rep. Coble). That history further demonstrates that Congress considered the CTEA a reasonable and necessary response to changing demographic trends, evolving international standards, advances in technology, and extended life expectancy. See

S. Rep. No. 104-315, at 10 (1996); 144 Cong. Rec. S12377-78 (daily ed. Oct. 12, 1998) (statement of Sen. Hatch).

Petitioners would have the Court ignore Congress's findings and render its own independent judgment as to whether the copyright terms prescribed by the CTEA are of a sufficiently "limited Time[]," and as to whether they adequately "promote the Progress of Science." Again, that argument must be rejected under the deferential standard that applies under this Court's precedents.[2]

II. CONGRESS REASONABLY CONCLUDED THAT THE CTEA WOULD PROMOTE THE PROGRESS OF SCIENCE.

Petitioners' challenge to the CTEA hinges on a narrow understanding of the constitutional purpose of copyright protection. They assert that copyright protection "'promote[s] the Progress of Science'" only if it can be said to "'stimulate[]' ... 'the creative activity of authors.'" Pet. Br. 22 (first alteration in original). In Petitioners' view, an extension of the copyright term for subsisting works cannot have that effect "because the incentive is being given for work that has already been produced"—"[r]etroactive extensions cannot 'promote' the past." *Id.*

Petitioners' argument may have some superficial appeal. But it fails on closer analysis. Petitioners' myopic conception of the purpose of copyright is contradicted both by the plain

[2] Recognizing that they cannot prevail under the standard applicable here, Petitioners ask this Court to "adopt a rule of heightened review, requiring that any extensions be 'congruent and proportional' to proper Copyright Clause ends." Pet. Br. 31 (citing *City of Boerne* v. *Flores*, 521 U.S. 507, 508 (1997)). For the reasons explained above, however, it is well established that statutes enacted pursuant to the Copyright Clause are reviewed under a standard that is more deferential, and does not require the government to demonstrate that term extensions are "congruent and proportional" to what Petitioners deem "proper Copyright Clause ends." Because Petitioners have offered no persuasive reason why this Court should depart from that precedent, their argument on this point must fail.

language of the constitution and by its consistent application since the time of the First Congress. The historical evidence set forth below demonstrates that the Framers understood that copyright protection "promote[s] the progress of science" not only by providing incentives for the creation of artistic works in the first instance, but also by encouraging authors and publishers to ensure that those works are adequately preserved and distributed to the public.

The CTEA surely survives constitutional scrutiny under this broader understanding of the constitutional purpose of copyright, and even under the narrow understanding advanced by Petitioners. Congress had before it an extensive evidentiary record that demonstrated that the CTEA would promote the progress of science by enhancing incentives for the distribution and preservation of copyrighted works and by encouraging the creation of new works. Petitioners ask the Court to disregard that evidence, and to accept instead their assessment of the wisdom of an extension of the copyright term. That request must be rejected as inconsistent with the language of the Constitution and with the original understanding and historical treatment of copyrights.

A. Copyright Extension Is Consistent With The Founding-Era Notion Of Promoting The Progress Of Science.

Despite Petitioners' unsupported assertion to the contrary, the language and history of the Copyright Clause support a broad understanding of the purpose of copyright protection that extends beyond the incentive for creation of artistic works in the first instance. The starting point, of course, is the language of the Constitution, which empowers Congress "[t]o promote the progress of science" by protecting copyrights. Of these words, the key term is "progress." Everyone agrees that the notion of "science" in the founding era referred generally to all forms of knowledge and learning. See Thomas Sheridan, *A Complete Dictionary of the English Language* (5th ed., 1789), *microformed on* Early American

Imprints 1st Series, Fiche 45588 (Readex Microprint) (defining "science" as "any art or species of knowledge"); John Elliott, *A Selected, Pronouncing and Accented Dictionary* 161 (1800), *microformed on* Early American Imprints 1st Series, Fiche 37356 (Readex Microprint) (defining "science" as "knowledge, skill art"); see also Pet. Br. 15, n.4 (acknowledging this meaning of "science" at the time of the framing). "Promote" is similarly uncontroversial. It meant "to forward" or "to advance." Sheridan, *supra* (defining "promote" as "to forward; to exalt; to prefer"); Elliott, *supra* (defining "promote" as "to forward, advance").

Petitioners' challenge to the CTEA is based on a narrow conception of the term "progress": that of "'advancement; motion forward,'" Pet. Br. 15, n.4—meaning (presumably) an increase in the number or quality of artistic works. Petitioners insist that copyright extensions cannot increase the number or quality of works already in existence, and thus contend that the CTEA does not advance "the ends specified in the *progress* half of the Copyright Clause." *Id.* at 22.

But this narrow meaning cannot be the one intended by the Framers. The founding-era understanding of "progress" clearly extends to the dissemination or distribution of existing artistic works, and is not limited to an increase in quantity or quality. This is clear from the founding-era usage of "progress," from the structure of the Copyright Clause, and from the longstanding history of copyright term extensions.

1. Founding-era dictionary definitions of "progress" focus predominantly on a notion of physical movement or dissemination. Noah Webster's first American dictionary includes a series of definitions of progress, the first two of which clearly connote "a moving or going forward." Noah Webster, *American Dictionary of the English Language* (photo. reprint 1967) (1828). Thomas Sheridan's 1789 definitions similarly encompass "motion forward" and "a journey of state, a circuit." Sheridan, *supra* ; see also William Perry, *The Royal Standard English Dictionary* 413 (1788),

microformed on Early American Imprints 1st Series, Fiche 21385 (Readex Microprint) (defining "progress" as "course; advancement; journey"); Samuel Johnson, *A Dictionary of the English Language* (1773) (defining "progress" as "course; procession; passage" and as "advancement; motion forward").

A full-text search for the term in the electronic version of the Federalist Papers, *available at* http://memory.loc.gov/const/fedquery.html), reveals 24 instances of the word in this important work.[3] The predominant use of the term in the Federalist Papers is in reference to an advancement or movement—as in a physical or metaphorical journey. In No. 15, for example, Alexander Hamilton alludes to "the road" over which his readers "have to pass" and "the field through which [they] have to travel," and indicates his goal "to remove the obstacles from your progress in as compendious a manner as it can be done." And in No. 73, Hamilton refers to the possibility of the King of England thwarting the "progress to the throne" of a "joint resolution[] of the two houses of Parliament" that he may find "disagreeable to him."[4]

Most of the other uses of the term in *The Federalist* also connote physical movement or "spread," often of some mechanism of destruction. In Federalist No. 8, for example, Hamilton speaks of the "rapid desolation which used to mark the progress of war," and of various "impediments" that could "exhaust the strength and delay the progress of an invader."

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[3] The term "progress" appears in Federalist Nos. 1, 2, 5, 6, 7, 8, 9, 15, 16, 18, 22, 26, 30, 34, 40, 41, 43, 56, 58, 63, 73, 79, 84, and 85.

[4] *See also Federalist* No. 5 (discussing the "circumstances which tend to beget and increase power in one part and to impede its progress in another"); *Federalist* No. 79 (speaking of the "progress" over time of the "service" of judges, and their need in the course of that progress for an increase in the "stipend" that would have been "very sufficient at their first appointment"); *Federalist* No. 9 (noting the "progress towards perfection" in government represented by innovations such as separation of powers and checks and balances); *Federalist* No. 40 (identifying the "origin and progress of the experiment" undertaken by the Framers).

Similarly, in Federalist No. 2, John Jay writes of "the progress of hostility and desolation," while Hamilton in No. 34 alludes to a "cloud" that "has been for some time hanging over the European world" that he fears "in its progress a part of its fury would ... be spent upon us." See also Federalist No. 7 (discussing "the progress of the controversy between this State and the district of Vermont"); Federalist No. 18 (noting the "progress" of various tyrants in the Greek empire).

The idea of "progress" as physical movement is also carried forward in the usage of the term in founding-era newspapers and other tracts. In a forthcoming publication, one scholar reports the results of her "full text search of each surviving issue" of the Pennsylvania Gazette ("the New York Times of the American colonies") from the founding era. See Malla Pollack, *What is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution*, 80 Neb. L. Rev. (forthcoming 2002). The results of this search are powerful evidence of the common usage of the term "progress" in the Framers' generation:

> By far, the most common use of "progress" was for destructive physical movement. The single most common word in the phrase "the progress of ..." is "fire." The Gazette speaks of "the progress of a fire" when a modern newspaper would report its "spread."

Id. Similar uses of the term include the progress of armed troops, an illness, insects, bad weather, or hostile ships. *Id.*

The usage of "progress" as a physical dissemination or spread is also indicated by the context surrounding the term as it appears in several State copyright statutes enacted under the Articles of Confederation. The copyright statutes enacted in Massachusetts, New Hampshire, and Rhode Island all begin with a preamble along the following lines: "Whereas the improvement of knowledge, the progress of civilization, the public weal of the community, and the advancement of human happiness, greatly depend on the efforts of learned and

ingenious persons in the various arts and sciences ...." An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions, for twenty-one years, Acts and Laws of the Commonwealth of Massachusetts 236 (Mar. 17, 1783), *reprinted in* 8 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* app. 7 § C[2] (1993) (Massachusetts statute of Mar. 17, 1783).[5] In context, the term "progress" as used in these statutes again connotes physical dissemination or spreading—as in the goal of seeing civilization spread (to its manifest destiny) throughout the new world.

The goal of assuring such "progress" was no empty aspiration under the State copyright statutes of this era. Under several such statutes, an author's copyright could be lost if he failed to make sufficient copies of his work available at reasonable prices. *E.g.* 8 Nimmer & Nimmer, *supra*, app. 7-36 § C[11] (Georgia statute of Feb. 3, 1786) ("[W]henever [an] author ... of such book ... shall neglect to furnish the public with sufficient editions thereof, or shall sell the same at a price unreasonable ... the ... court is ... authorized and empowered to give to such complainant [filing against the author] a full and ample license to re-print and

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[5] *See also* An Act for the encouragement of literature and genius, and for securing to authors the exclusive right and benefit of publishing their literary productions, for twenty years, The Perpetual Laws of the State of New-Hamphsire, from July, 1776, to the session in December, 1788, continued into 1789, at 161-62 (1789) *reprinted in* 8 Nimmer & Nimmer, *supra* app. 7 § C[5] (New Hampshire statute of Nov. 7, 1783) (identifying the goals of "the improvement of knowledge, the progress of civilization, and the advancement of human happiness"); An Act for the purpose of securing to authors the exclusive right and benefit of publishing their literary productions for twenty-one years, At the general assembly of the governor and company of the State of Rhode-Island and Providence-Plantations, begun and holden at East-Greenwich on the 4th Monday of December, 1783, at 6-7 (1783) *reprinted in* 8 Nimmer & Nimmer, *supra* app. 7 § C[6] (Rhode Island statute of Dec. 1783) (articulating the goals of "the improvement of knowledge, the progress of civilization, the public weal of the community").

publish such book, pamphlet, map or chart ....") Moreover, many of the State laws spoke of encouraging the publication of works, not their creation. Using essentially the same language, the prefaces of the Connecticut, New Hampshire, Georgia, and New York Acts state that their purpose was to "encourage men of learning and genius to publish their writings." 8 Nimmer & Nimmer, *supra* app. 7 § C[1], [5], [11], [12].

2. The notion of "progress" as a physical dissemination was the predominant usage of the term in the founding era, but it was not the only one. The above-cited dictionaries focused primarily on the idea of movement or a journey, but a couple of them also included the notion of "intellectual improvement." See Sheridan, *supra* ("intellectual improvement"); Johnson, *supra* ("intellectual improvement; advancement in knowledge; proficience"). The same can be said of the usage of the term in the Pennsylvania Gazette and the Federalist Papers: the idea of movement predominated, but "progress" was also used (albeit infrequently) to connote qualitative or quantitative improvement. See Pollack, *supra*; Federalist No. 58 (discussing the impact of "the progress of population" on representation in Congress).

This latter connotation does not advance Petitioners' cause, however. "Intellectual improvement" may be promoted not only by an increase in the number or quality of works, but also by encouraging the broader dissemination of those that already exist. And in any event the CTEA *does* foster the creation of new copyrightable works, for the reasons discussed below. See *infra* at 23-26.

Moreover, the notion of "progress" as an increase in the quantity or quality of artistic works makes no sense in the context of the Copyright Clause—since it makes its words redundant. After all, "promot[ing] ... science and the useful arts" is at least as effective a way to express the idea of increasing the number or character of copyrighted works. See Pollack, *supra* (making the argument that the term "progress"

is surplusage under Petitioners' definition). Thus, if for no other reason, Petitioners' conception of "progress" should be rejected on the ground that it fails to give meaning to all of the words of the Copyright Clause. See *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 77-78 (1946) ("'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added.'") (quoting *Holmes* v. *Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840)).

Moreover, if the Framers had intended to limit Congress to establishing incentives for the creation of artistic works, and to foreclose the goal of promoting their distribution, surely they would not have chosen the broad language of the Copyright Clause. The Framers easily could have followed the language and structure of the British Statute of Anne, which was enacted by Parliament for the express purpose of "the encouragement of learned men to compose and write useful books." 8 Anne c. 19, § 1 (1710) (Eng.). The fact that they chose instead to authorize Congress to "promote the progress of science" suggests that they intended to give broader discretionary authority to take steps aimed at promoting distribution or dissemination—as the predominant usage of the term progress would indicate.

Indeed, at least until 1976, distribution and dissemination (and not creation) were the *exclusive* focus of American copyright law. Until the 1976 Copyright Act, copyright attached not upon creation but only upon publication.[6] For

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[6] The 1976 Copyright Act expanded statutory protection to works previously protected only by the common law: "Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the terms provided by section 302." 17 U.S.C. § 303 (1976). Prior to that change, the Act provided that "nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or equity, to prevent the copying, publication, or use of such

almost two centuries, Congress was focused not on encouraging the initial process of artistic creation, but on providing incentives for publication. See *Feist Publ'ns, Inc.* v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 352-57 (1991) (outlining the changes made by the 1976 Act). Because (as explained in detail below) Congress concluded that the CTEA would advance this same goal, the statute can hardly be invalidated on the ground that it may not affect the initial creative process.

3. Petitioners' conception of "progress" is also undermined by the long history of copyright extensions and renewals in Britain and America. If copyright protection could not extend beyond the term initially promised to the author, the entire history of copyright would be called into question.

American copyright law was patterned after its British counterpart, which was first codified in the Statute of Anne. See 8 Anne, c. 19 (1710) (Eng.). The copyright term under the Statute of Anne was for an initial 14-year term, renewable for an additional 14 years if the author was still living. *Id.* §§ 1, 11. The first American Copyright Act of 1790 followed a similar approach. It conferred an initial term of 14 years, and also provided for a 14-year renewal term—if the author survived (or assigned his rights in the renewal term during the initial period) and filed the necessary renewal papers. Copyright Act of 1790, ch. 15, § 1, 1 Stat. 124, 124. Thus, under the Statute of Anne and the first Copyright Act, the copyright term might have been only 14 years, or it might have been extended for a full 28 years, depending on the author's longevity and diligence either in making an assignment or in filing the renewal documents.

Petitioners' challenge to the CTEA cannot be accepted without calling into question this original approach to copyright protection. After all, the author who created an

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unpublished work without his consent, and to obtain damages therefor." Act of Mar. 4, 1909, ch. 320, § 2, 35 Stat. 1075, 1090.

artistic work under the Statute of Anne or the first Copyright Act was assured of a copyright term of only 14 years; by definition, that assurance was a sufficient incentive for the creation of the work in question, and accordingly any extension for an additional term is an unconstitutional windfall—since the "[r]etroactive extension[]" granted by a renewal application "cannot 'promote' the past" and is "for work that has already been produced." Pet. Br. 22.[7]

The extension conferred by the CTEA finds an even closer analogy in another feature of the Copyright Act of 1790, which granted the above-noted copyright term (of 14 or potentially 28 years) to *all* works protected under the copyright laws of the several states. In so doing, the 1790 Act effectively extended the copyright term anticipated by the author at the time his work was created. Because some of the works previously protected under state law would have fallen into the public domain prior to the expiration of the federal term, the 1790 Act had the same effect as the CTEA: it harmonized the copyright term applicable to a broad range of works,[8] and in so doing it forestalled the date on which some of those works would have fallen into the public domain.

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[7] Although the author of a work protected under these statutes was also aware of the possibility of an extension, that fact does not meaningfully distinguish such an author from authors under the pre-CTEA Copyright Act. A modern author might also anticipate the possibility of an extension, particularly where (as here) technological and market changes have led other developed nations to extend the copyright term.

[8] Petitioners insist that the CTEA did not promote harmonization because "[t]here are 76 countries today with a life plus 50 regime but only 26 with life plus 70." Pet. Br. 44. But this misses the point: the CTEA promotes harmonization of the copyright term among the countries that are America's principal trading partners. *See* H.R. Rep. No. 105-452, at 4 (1998) ("Extending copyright term to life of the author plus seventy years means that U.S. works will generally be protected for the same amount of time as works created by European Union authors."); S. Rep. No. 104-315, at 6 (noting "the international movement towards extending copyright protection for an additional 20 years"). And the analogy to the

This effect of the 1790 Act is best seen by a detailed examination of the various state statutes enacted under the Articles of Confederation. Twelve state statutes were enacted in this pre-constitutional period. See 8 Nimmer & Nimmer, *supra* app. 7 § C (setting forth the text of these statutes). Seven of those statutes (Connecticut, Maryland, New Jersey, Pennsylvania, South Carolina, Georgia, and New York) adopted the Statute of Anne approach of a 14-year term renewable for an additional 14 years if the author were still living. *Id.* app. 7 § C[1], [3], [4], [7], [8], [11], [12]. Each of the remaining five statutes authorized a single, non-renewable term of 14 (North Carolina), 20 (New Hampshire), or 21 years (Massachusetts, Rhode Island, and Virginia). *Id.* app. 7 § C[2], [5], [6], [9], [10].

The 1790 Act conferred copyright protection on any and all works created under the above regimes (as well as those created without the "carrot" of any copyright protection at all, as in Maine, or in other states prior to their enactment of a copyright act). It did so by resetting the copyright clock upon the author's registration of the work in question with the clerk of a federal district court. Copyright Act of 1790, ch. 15, §§ 1, 3, 1 Stat. at 124-25. Thus, the first Congress crossed the very line Petitioners claim to be drawn by the Constitution: it granted a retroactive extension for works that had "already been produced" and thus that cannot be "'promote[d]'" by an increase in the copyright term. Pet. Br. 22.

This point can be illustrated by a work like Noah Webster's *American Spelling Book*. This book was initially copyrighted under state law, but the terms available under the state copyright acts were retroactively extended by the Copyright Act of 1790. Specifically, Webster's copyright under the Connecticut Act would have run for 14 years from the date of first publication in 1783. See Noah Webster, *A Gramatical Institite of the English Language* (Hartford 1783); 8 Nimmer

1790 Act again is apt: it harmonized the copyright term among the new States, recognizing that a different term might apply in other countries.

& Nimmer, *supra* app. 7 § C[1] (reproducing the Connecticut statute, which provided for a 14-year term from the date of first publication). Thus, Webster's Connecticut copyright was set to expire in 1797, but the 1790 Act extended it through 1804, and made it renewable until 1818.

Petitioners' construction of the Copyright Clause would have precluded this approach. Webster's book was produced under the promise of a term set to expire in 1797; the extension granted by the 1790 Act could not "'promote' the past," and thus the Act would fail under Petitioners' standard.

The significance of the 1790 Act cannot be avoided by the facile notion that "something had to be done to begin the operation of federal law under the new federal Constitution." *Eldred*, 239 F.3d at 384 (Sentelle, J., dissenting). *Something* had to be done, but that *something* did not have to be an extension that applied to writings already in existence. If Congress doubted its power to enact such an extension, surely it could have enacted federal copyright protection for the period of any remaining copyright term applicable under state law. The fact that it instead adopted a uniformly applicable term postponing the date on which some works would otherwise have fallen into the public domain undermines Petitioners' argument that Congress lacks such power.[9]

Congress has made similar extensions to the copyright term in subsequent iterations of the Copyright Act. Thus, the First Congress and its successors concluded that a retroactive extension does promote the progress of science—by encouraging the dissemination and preservation of existing works. Unless this Court is prepared to set aside the entirety

[9] Petitioners' attempt to dismiss the 1790 extension as a mere "replacement" for state copyrights, Br. Pet. 28, is equally unpersuasive. Whether denominated a "replacement" for existing rights or an "extension," the 1790 Act had the same effect as the CTEA: it lengthened the copyright term that otherwise would have applied to subsisting works.

of copyright protection throughout the history of this country, it should uphold the parallel extension granted in the CTEA.

B. Congress Relied On Evidence That Copyright Extension Would Encourage The Distribution And Preservation Of Subsisting Works.

Petitioners seek to paint the CTEA as a windfall designed by Congress merely to line the pockets of a well-funded lobby of publishers and motion picture producers. Pet. Br. 23 (arguing that the extensions provided by the CTEA are "a windfall, not an incentive"). But the evidentiary record leading up to the enactment of the CTEA includes extensive evidence that copyright extension would promote the progress of science in the ways discussed above: by encouraging the distribution and dissemination of copyrighted works.

1. In the hearings prior to the enactment of the CTEA, a number of witnesses testified that an extension of the copyright term would enhance the dissemination and distribution of copyrighted works. Marybeth Peters, for example, the Register of Copyrights, testified that "[i]n some cases the lack of copyright protection ... restrains dissemination of the work, since publishers and other users cannot risk investing in the work unless assured of exclusive rights." *Copyright Term, Film Labeling, and Film Pres. Legis.: Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary,* 104th Cong. 171 (1996) (Statement of Marybeth Peters). In other words, because "the author frequently assigns his right to a publisher, film producer or other disseminator of the work, ... the copyright in the work represents a protection for the investment that is undertaken in the publication or production of the work." *Id.* at 188. If the remaining term on the copyright is not "sufficient to allow the investor time not only to recover but also to earn a reasonable return on his investment," then the work in question will not be published or otherwise disseminated to the consumer. *Id.* In such circumstances, extension of the

copyright term will enhance distribution or dissemination by increasing the "return" on investment in such activity. *Id.*; see also *id.* at 633-34 (Joint Statement of the Coalition of Creators and Copyright Owners) (noting that the "costs of quality production, distribution and advertising, and changing technology, all require a major investment to exploit most works," and that "[f]ew are willing to make such significant expenditures" in the absence of a lengthy copyright term).

Thus, in enacting the CTEA, Congress reasonably concluded that an extension was necessary to create adequate incentives for investment in dissemination throughout any remaining copyright term. Without an extension, the incentive for publishers and other distributors to invest in dissemination could decline toward the end of the copyright term. Thus, the CTEA promotes the progress of science by expanding incentives for disseminating protected works at a time when such works might otherwise fall out of circulation.

2. The evidentiary record before Congress also indicates that the need for a term extension of existing works is especially significant during the current period of conversion to digital media. Congress heard testimony, for example, that extension of copyright protection will "encourage[] industry to make available to the public in new editions, and much finer editions, works which otherwise would have remained moldering in the library." *Id.* at 212. "Although existing copyright protection was apparently adequate to encourage the initial creativity necessary for existing works," Congress perceived a need to extend the terms of "works already in being to encourage investment in those works" to ensure that they would be disseminated in new digital formats. *Id.* at 635 (Joint Statement of the Coalition of Creators and Copyright Owners). In other words, Congress sought to "encourage not only initial creativity, but investment in new technology to maximize the dissemination of older works." *Id.*

Specifically, the record before Congress indicates that certain "works require expensive or labor-intensive main-

tenance, restoration or distribution," and that "continued copyright protection can induce owners to invest in making the work available to the public in high-quality form." *Id.* at 593 (Memorandum from Shira Perlmutter). Because investment in new technology is costly, Congress determined that an extension was an appropriate mechanism for assuring increased dissemination in the digital marketplace. *Id.* (explaining that extension will ensure that "copyright owners will have a greater incentive to take whatever steps may be necessary to disseminate their works in high-quality form if they can retain control over reproduction and distribution," and that the "availability of more works of authorship in superior condition" thus "furthers the progress of science").

3. Technological innovation has also opened up new opportunities for the promotion of the "progress of science" by means of the preservation of existing copyrighted works. Again, the evidentiary record before Congress includes extensive support for the conclusion that copyright extension will increase the incentive for investment in preservation—such as in new digital formats. As Bruce A. Lehman, then Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, testified, "[g]ranting a twenty-year copyright term extension will encourage copyright owners to restore and digitize works that are about to fall into the public domain." *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 26 (1997). "Without a copyright term extension, copyright owners will have little incentive to restore and digitize their works," and "they might deteriorate over time and our children would be unable to enjoy these works as we have." *Id.*; *see also id.* at 42 (Statement of Jack Valenti, President, Motion Picture Association of America) (fearing that "no one ... will invest the funds for enhancement" without "an incentive to rehabilitate and preserve" certain works); *id.* at 115 (Responses to Questions from Senator Brown to Marybeth Peters) (explaining that "many works

may be more readily available to the public, and in better and more usable condition, when they are still protected by copyright," and "[c]opyright protection gives publishers and producers an incentive to invest in the expensive and time-consuming activities that may be required to preserve, update and restore older works.").

In enacting the CTEA, Congress embraced this and other evidence of the positive effects of copyright extension on dissemination and preservation. Senator Hatch, for example, endorsed the evidence of improved incentives for dissemination and preservation in digital formats:

> Many works which are now preserved in perishable media, such as film or analog tape recordings, could be more permanently preserved—and more widely disseminated—in digital formats, using emerging technology. But if we want the substantial investment in digitizing these works to be made, we must choose to either have the taxpayer fund investment in public domain works or to give private parties the incentive to invest by allowing them to recoup their investment. Extending the copyright for an additional two decades can provide this incentive for private funds to be invested in the preservation of artworks important to the American cultural heritage.

Id. at 3 (Opening Statement of Senator Hatch). The Senate and House Reports confirm that the statute's enactment rested in part on the observation that "[t]he digital revolution ... offers exciting possibilities for storage and dissemination of [copyrighted] works," S. Rep. No. 104-315, at 13, and on the understanding that the CTEA would create incentives for the use of new technology and thereby promote the dissemination and preservation of copyrighted material. See also H.R. Rep. No. 105-452, at 4 (1998) (CTEA will "provide copyright owners generally with the incentive to restore older works and further disseminate them to the public.").

Congress's findings cannot be set aside on the ground offered by Petitioners—that extensions will postpone the date on which third parties may begin disseminating and preserving works that have fallen into the public domain. See Pet. Br. at 3 (noting the effect of the CTEA on "individuals and businesses that rely upon speech in the public domain for their creative work and livelihood"). Congress found that the CTEA would increase the availability of artistic works by enhancing the incentive for investments in distribution and preservation. Neither Petitioners nor the courts are in any position to insist that this goal would have been better served by erasing those incentives and relying on the public domain.

In any event, Petitioners' assessment of this balance can be accepted without questioning Congress's decision to extend the copyright term. Even if extensions were thought to dampen dissemination at the time the work was set to fall into the public domain, that possibility would only underscore another tradeoff considered by Congress: extension might increase dissemination during an earlier period leading up to expiration of the term, but might decrease dissemination during a later period after the term otherwise would have expired.[10]

Ultimately, Congress was called upon to strike the difficult balance between these possibly competing considerations. In so doing, it heard evidence that candidly acknowledged that the optimal balance was "very difficult to estimate" and may

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[10] Marybeth Peters, Register of Copyrights, summed up the tradeoff in her testimony to Congress: "The ultimate question is not whether the public domain has value, since all works will eventually fall into the public domain. It is instead whether the value to the public of works falling into the public domain 20 years earlier outweighs the value of the incentives provided by an additional 20 years of copyright." *The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Comm. on the Judiciary*, 104th Cong. 115 (1997) (Responses to Questions from Senator Brown to Marybeth Peters). This is the type of tradeoff whose resolution the Framers delegated to Congress.

vary over time for "different types of works and individual works within different genres." *Copyright Term, Film Labeling, and Film Pres. Legis.: Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on the Judiciary*, 104th Cong. 188 (1996) (Statement of Marybeth Peters). Petitioners may not agree with the balance arrived at by Congress, but that balance is for Congress to strike, not the courts.

C. Congress Also Relied On Evidence That Copyright Extension Would Encourage The Creation Of New Works.

Although copyright extensions promote the "progress of science" by encouraging the dissemination and preservation of existing works, the CTEA also advances the goals identified in the Copyright Clause by enhancing incentives for the creation of copyrighted works in the first instance. It does so by maintaining Congress's longstanding tradition of periodically revising the copyright term to (1) maintain its consistency with international standards, and (2) ensure that copyright holders are able adequately to capitalize on the fruits of their labors.

As explained in detail above, copyrighted works are created against the backdrop of a longstanding congressional practice of periodically reviewing and revising the copyright term. The first Copyright Act extended the term of subsisting works already protected under state copyright laws, Act of May 31, 1790, ch. 15, § 1, 1 Stat. at 124, and subsequent statutes have extended the copyright term for works created under federal law, see Act of Feb. 3, 1831, ch. 16, §§ 1-3, 4 Stat. 436, 436-37; Act of Mar. 4, 1909, ch. 320, § 24, 35 Stat. 1075, 1075-78; Act of Oct. 19, 1976, Pub. L. No. 94-553, §§ 302-304, 90 Stat. 2541, 2572-76. With each extension, Congress reacted to changes in the market for literary and other works of authorship, making adjustments intended to assure a fair return on the investment made by the author.

The CTEA simply followed this tradition. In extending the copyright term, Congress was simply recognizing that the changing global marketplace merited a somewhat longer period of protection than was warranted in an earlier era. See S. Rep. No. 104-315, at 6 ("In the 20 years since the passage of the 1976 Copyright Act, developments on both the domestic and international fronts have led to further consideration of the sufficiency of the life-plus-50 term."); 144 Cong. Rec. S11673 (daily ed. Oct. 7, 1998) ("In the global world of the next century, competition in the realm of intellectual property will reach a ferocity even more ruthless than it is today.") (comments of Sen. Leahy).

Contrary to Petitioners' argument, this extension was not a naked windfall to copyright holders. Rather, it fulfilled the justified expectation that Congress will periodically review and revise the copyright period. In so doing, Congress not only confirmed the expectation of existing copyright holders; it also preserved its ongoing good faith in the eyes of the authors of new copyrighted works. Such an extension accordingly does advance the goal of enhancing the incentive for the creation of new copyrighted works.

Indeed, Congress had before it an extensive evidentiary record that supported the conclusion that an extension would improve incentives for creation of copyrighted works. As one witness explained:

> Granting a copyright term extension ... would provide copyright owners with an additional twenty years in which to exploit their works. The additional twenty years will enable copyright owners to increase the exposure of their works. This would result in greater financial rewards for the authors of the works, which will in turn, encourage these authors to create more new works for the public to enjoy.

Hearings on H.R. 989, H.R. 1248 and H.R. 1734 Before the Subcomm. on Courts and Intellectual Prop. of the Comm. on

the Judiciary, 104th Cong. 219 (1996) (Statement of Bruce A. Lehman, Commissioner of Patents and Trademarks). In other words, as the Register of Copyrights testified, "The public benefits not only from an author's original work but also from his or her further creations. Although this truism may be illustrated in many ways, one of the best examples is Noah Webster, who supported his entire family from earnings on his speller and grammar during the twenty years he took to complete his dictionary." *Id.* at 165 (Statement of Marybeth Peters,); see also *id.* at 109 (Statement of Martha Coolidge, Member, Directors Guild of America, Inc.) ("Cycling more money through the system through an extended copyright term will help insure future production."); *id.* at 583 (Letter from Paul Goldstein to Jack J. Valenti, Motion Picture Association of America) ("By increasing the value of their libraries overall, term extension can give them revenues to produce new films during the extension period. Further, companies are more likely to invest resources in creating sequels or remakes of existing works if they know that the expiration of the copyright in the original work is more than twenty years in the future. If a work is about to fall into the public domain there is much less incentive to make a derivative work since any rights in underlying works will soon become—in effect—non-exclusive.").

And again, Congress clearly intended to advance this objective in enacting the CTEA. The statute's legislative history indicates Congress's view that "a creative work is of legitimate proprietary interest to the families of the authors," and makes clear that the CTEA was enacted "for the purpose of giving creators an incentive to advance knowledge and culture by allowing them to reap the economic benefit of their creations for 'limited times.'" S. Rep. No. 104-315, at 10. The CTEA accomplishes that purpose by "protect[ing] the author and at least one generation of heirs"—an outcome which, according to testimony presented to Congress, could not have been achieved under pre-existing laws. *Id.* at 10-11.

In enacting the CTEA, Congress also "sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity." *Id.* at 12. "'Technological developments clearly have extended the commercial life of copyrighted works.'" *Id.*

At a minimum, Congress acted rationally in accepting this evidence of the CTEA's positive effects on the "progress of science" and in rejecting the contrary position espoused by Petitioners. This Court should defer to Congress's balancing of the competing considerations at issue and uphold the constitutionality of the CTEA.

III. THE COPYRIGHT TERM EXTENDED BY THE CTEA IS FOR "LIMITED TIMES."

Refuting a straw man of their own creation, Petitioners devote a substantial portion of their brief to the unremarkable proposition that Article I prohibits Congress from granting perpetual copyrights. See Pet. Br. 11-17. In so doing, Petitioners suggest that the mere existence of that limitation mandates reversal in this case, and that the decision below rests on the assumption that "the Copyright Clause grants Congress effectively unbounded authority." *Id.* at 11. In particular, Petitioners argue that the "limited times" language in the Copyright Clause prohibits not only perpetual copyrights, but also extensions of copyrights already in existence. This argument fails because it disregards the language of the Copyright Clause, the historical context in which that provision came into existence, and Congress's longstanding practice of extending subsisting copyrights.

1. The copyright protection extended by the CTEA is of limited duration and is entirely consistent with the "limited times" language in the Copyright Clause. As Petitioners acknowledge, a term is limited if it is confined within limits, "such that it is not 'le[ft] at large.'" *Id.* at 17 (quoting Samuel

Johnson, *A Dictionary of the English Language* (W. Strahan 1755)). Under this definition, there can be no doubt that the terms prescribed by the CTEA are "limited." Far from leaving those terms unsettled or "at large," the CTEA prescribes a specific, fixed term for every copyrighted work.

Petitioners nevertheless contend that the CTEA violates the "limited times" requirement in extending the terms of pre-existing copyrights—terms that were set to expire at a specific time prescribed by a previous act of Congress. *Id.* at 18. In other words, they argue that the copyright power may be exercised once, and only once, with respect to a particular work, and must be exercised in such a way that each work will pass into the public domain on a specific date prescribed by laws in effect at the time of its initial publication.

Petitioners offer no textual support for this novel theory. Nor can they—the Copyright Clause broadly empowers Congress to grant copyright protection for "limited times," and is utterly devoid of any language capable of supporting such a sweeping limitation. Instead, Petitioners rely on hyperbole, threatening that a decision upholding the CTEA would effectively authorize Congress to create "a perpetual term 'on the installment plan'" by enacting successive (but limited) term extensions "ad infinitum." *Id.*

Petitioners' concerns are unfounded. There is nothing in the record suggesting that the CTEA is the product of a multi-generational conspiracy within Congress to create a perpetual copyright term. Quite to the contrary, the record (quoted in detail above) is replete with evidence that the CTEA is the product of Congress's rational judgment that the limited term extensions authorized by that statute were a useful means of promoting the progress of science—particularly in light of recent developments in technology, changing demographic trends, and evolving international copyright standards.

The fact that Congress *could* at some point attempt to circumvent the "limited times" requirement is irrelevant. If

Petitioners' "speculation comes to pass," and Congress attempts to circumvent the constitutional limits on its copyright power, "the Court can address the problem at that time." *Utah* v. *Evans*, 122 S. Ct. 2191, 2203 (2002). In the meantime, however, the relevant inquiry is whether Congress has exceeded its authority here, which it plainly has not.

Nor can it be said that there is no "practical stopping point" to Congress's power once the authority to grant extensions is recognized. Pet. Br. 13. Granted, the subjective line between a permissible extension and one that effectively circumvents the "limited times" standard is difficult to draw in the abstract. But wherever that line may be, the CTEA clearly falls on the constitutional side of it.

An extension that continues Congress's longstanding practice of bringing the American copyright term in line with the emerging international standard is surely constitutional—particularly where (as here) it is consistent with an approach that was proposed before the founding era. More than 300 years ago, philosopher John Locke proposed that "for those who purchase copies from authors that now live and write, it may be reasonable to limit their property to a certain number of years after the death of the author ... as, suppose, fifty or seventy years." John Locke, *Memorandum 208-209* (circa 1694), *quoted in* Mark Rose, *Authors and Owners: The Invention of Copyright* 33 (1993). That standard—which is consistent with the term prescribed by the CTEA—is as reasonable today as it was 300 years ago. Congress's decision to embrace it should therefore be upheld.

2. Petitioners' construction of the "limited times" provision is further undermined by the alternative language that was proposed but rejected by the Framers. As Petitioners acknowledge, Charles Pinckney of South Carolina originally proposed that Congress be authorized to grant copyright protection for "'a certain time.'" Pet. Br. 17 (citing 3 *Documentary History of the Constitution of the United States* 556 (Dep't of State 1900) (Convention, Aug. 18, 1787)). The

Framers' rejection of this provision in favor of the "limited times" language suggests an intent to give Congress *more* discretion in deciding whether to extend a copyright term.

In context, the word "certain" connotes a sense of exactness and precision not associated with the word "limited." Compare 1 Samuel Johnson, *A Dictionary of the English Language* (1755) (defining "certain" as "resolved" or "determined") with 2 *id.* (definin "limit[ed]" as "restrain[ed]," "circumscribe[d]," or "not le[ft] at large"); see also Sheridan, *supra* (defining "certain" as "determined" or "limit[ed]" as "restrain[ed]" or "circumscribe[d]"); Perry, *supra* at 139, 324 (defining "certain" as "sure" or "resolved" and "limit[ed]" as "confine[d] within bounds"). Thus, the fact that the Framers adopted the word "limited" instead of "certain" suggests that although the temporal limitations on a particular copyright must be fixed by statute, Congress need not ascertain at the outset a specific date after which the owner's rights may not be enforced. Congress may extend the copyright term so long as each extension is limited in duration and reasonably promotes the progress of science.

The Framers' adoption of the plural "limited *times*" is also significant—particularly in contrast to James Madison's original proposal to authorize exclusive rights for "a limited time." 2 *Records of the Federal Convention of 1787*, at 321 (Max Farrand ed., 1911) (Convention, Aug. 18, 1787). A fixed copyright term that is subsequently renewed or extended for an additional finite period is easily consistent with the notion of "limited times" even if it might fail under the stricter standard of a "limited time." Indeed, at least one scholar has suggested that the very purpose of this change in language was to make clear that extensions were permissible. See George Ramsey, *The Historical Background of Patents*, 18 J. Pat. Off. Soc'y 6, 14 (1936).

3. Petitioners' "limited times" argument also fails for the additional reason that it ignores the historical context in which the Copyright Clause came into existence. In

particular, Petitioners' argument ignores strong historical evidence that the Framers knew how to draft language prohibiting Congress from extending existing copyrights, but declined to do so. For example, the Statute of Anne—which, as Petitioners point out, was the first legislation prohibiting perpetual copyrights—limited new copyrights to two consecutive terms of "fourteen years ... *and no longer.*" 8 Anne, ch. 19, §§ 1, 11 (1710) (Eng.) (emphasis added). The Framers could have imposed a similar qualification on Congress's copyright authority, but chose not to.

Indeed, in August 1789, Thomas Jefferson, apparently displeased with the language adopted by the Framers, proposed to James Madison a provision in the pending Bill of Rights that: "Monopolies may be allowed to persons for their own productions in literature and their own inventions in the arts for a term not exceeding—years *but for no longer term* and no other purpose." Letter from Thomas Jefferson, to James Madison (Aug. 28, 1789), *reprinted in* 1 *The Republic of Letters* 630 (James M. Smith ed., 1995) (emphasis added). Again, the Framers could have included such language in the Constitution. Their failure to do so leaves Congress free to decide whether to extend the terms of existing copyrights.

4. Finally, Petitioners' argument ignores the fact that, since the first copyright statute was enacted in 1790, Congress has repeatedly extended the terms of existing copyrights. See *supra* at 14-18. As explained above, the history of such extensions provides persuasive support for the conclusion that an extension of the copyright term that applies retrospectively to subsisting works is entirely consistent with textual limitations on Congress's copyright authority. See *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884).

CONCLUSION

For all these reasons and those in respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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